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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

EDMUND HERMAN ROTHFELDER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 19–22) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 24–29) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 23) was entered on February 28, 1973. By order of March 29, 1973, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari

to and including April 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the Criminal Appeals Act (18 U.S.C. 3731), which provides that the United States may appeal to the court of appeals from a decision of a district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution," an appeal by the United States is barred by prior jeopardy when the district court grants a pre-trial motion to dismiss, relying on facts outside the indictment, but no jury has been impanelled, and no trial without a jury has started, so that the defendant has never been in jeopardy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

The Criminal Appeals Act, 18 U.S.C. 3731, as amended, 84 Stat. 1890, provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

On September 2, 1971, a grand jury in the United States District Court for the Western District of Michigan returned an indictment charging respondent Edmund Herman Rothfelder with willfully failing to report for induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). Prior to trial, Rothfelder moved to dismiss the indictment on the ground that the local board's termination of his student deferment classification (I–S(C)) was improper, and that the order to report for induction was therefore invalid. The district court granted the motion (App. C, *infra*,

pp. 24–29), and the United States appealed to the court of appeals under the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control Act of 1970, 84 Stat. 1890. The court of appeals dismissed the appeal on the ground that it lacked jurisdiction. (App. A, *infra*, pp. 19–22).

1. The material facts are not in dispute. Respondent was ordered to report for induction in September, 1969. Because he was a full-time college student at that time, he requested and was granted a I–S(C) deferment which allowed him to complete "his academic year" (32 C.F.R. 1622.15(b)). In granting this classification, the local board originally indicated in its minutes that the I–S(C) classification would expire in October 1970 (App. C, *infra*, pp. 24–25).

Later, the Michigan State Selective Service Headquarters requested respondent's file for review, and after reviewing the file, notified the local board that normally the I–S(C) classification expires at the end of the registrant's academic year. Accordingly, it instructed the local board to review respondent's case in June 1970, and if he was not in summer school, the classification was to be reopened and considered anew (App. C, *infra*, pp. 25–26).

The local board complied with this directive. After reviewing respondent's file in June 1970, and finding that he was not enrolled in summer school, it reclassified him I–A on June 17, 1970. Following an unsuccessful appeal to the State Appeals Board, respondent was ordered to report for induction on February 8, 1971. The present indictment followed his failure to report as ordered (App. C, *infra*, p. 26).

2. Prior to trial, without the impanelling of a jury or the commencement of a trial without a jury, the respondent moved to dismiss the indictment pursuant to Rule 12(b)(1), Fed. R. Crim. P., on the ground that his I–S(C) classification was unlawfully terminated prematurely. Respondent claimed that under 32 C.F.R. 1622.15(b), then in effect, he was entitled to retain his I–S(C) classification for twelve months without regard to whether he actually completed the academic year for which the classification was issued. The district court held as a matter of law that "academic year" as used in 32 C.F.R. 1622.15(b) meant twelve months.[1] Based on this ruling, the court held

[1] On the merits of this issue, the government has contended that the district court erred in holding that "academic year" for I-S classifications meant twelve months. The district court relied on the definition of "academic year" prescribed in 32 C.F.R. 1622.25(b), which deals with the entirely different matter of determining a registrant's "eligibility" for a II–S classification under the regulations. The II–S deferment is designed to provide deferment from military service during the entire course of college studies, typically four years, and thus it is renewable annually upon certification of full-time enrollment, even though the student does not attend school during the summer. "Unlike the II–S, designed to permit education in the national interest, the I–S classification is intended to avoid the hardship and waste of an interrupted academic year. In permitting its student recipient to complete the academic year in which he received an induction order, the I–S classification saves him from the loss of academic credit and tuition which would otherwise result from the interruption of his school year." *Nestor* v. *Hershey*, 425 F. 2d 504, 513 (C.A.D.C.). In light of the completely different function served by the II–S deferment, there was no basis for reading its special definition of "academic year"—twelve months—into the I–S regulation to give the undefined term "academic year" in that regulation anything other than its natural meaning (the conventional school year from September to June). See *McLain* v.

that the local board improperly terminated respondent's I–S(C) classification before the expiration of twelve months and that the order to report for induction was unlawful (App. C, *infra*, p. 28). Accordingly, the district court granted respondent's motion to dismiss the indictment.

3. The United States filed a notice of appeal to the court of appeals, pursuant to 18 U.S.C. 3731, seeking review of the district court's construction of the term "academic year" in the applicable Selective Service regulation. The court of appeals, however, held that Section 3731, which authorizes an appeal to the court of appeals, from "a decision, judgment, or order of a district court dismissing an indictment * * * except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution," did not authorize an appeal from the pretrial dismissal of the indictment here. The court of appeals held that Section 3731 does not confer jurisdiction to hear an appeal from a pretrial dismissal of an indictment "that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If the indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available" (App. A, *infra*, p. 21).

In reaching this result the court of appeals rejected the argument that the appeal was not barred by the Double Jeopardy Clause because the trial had

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Selective Service Local Board No. 47, 439 F. 2d 737 (C.A. 8); *Robinson* v. *Hershey*, No. 17,697, decided July 14, 1969 (C.A. 7) (unreported opinion).

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not commenced and jeopardy had not attached. The court of appeals apparently adopted the view taken by the Court of Appeals for the Seventh Circuit, that the order of the district court was an "acquittal", and that an appeal was therefore barred by the Double Jeopardy Clause (App. A, *infra*, p. 21). See *United States* v. *Ponto*, 454 F. 2d 657 (C.A. 7, *en banc*); *United States* v. *McCreery*, No. 72–1457, decided February 2, 1973 (C.A. 7).

REASONS FOR GRANTING THE WRIT

This case raises issues of statutory construction and contitutional law that are important in the administration of federal criminal justice. The recently amended Criminal Appeals Act, 18 U.S.C. 3731, is the principal jurisdictional statute governing appeals by the government in criminal cases. The construction placed on the Act by the court of appeals deprives the government of the right to appeal from a wide variety of pretrial orders dismissing indictments which do not turn on "the sufficiency of the indictment alone," but involve the application of legal principles to generally undisputed or stipulated facts. The limitation engrafted by the court of appeals on the broad language of Section 3731 will not only have a substantial impact on the right of the government to appeal from pretrial dismissals, but it wholly ignores the expressed intent of Congress in amending Section 3731 to permit appeals in cases such as this.

In addition, the decision of the court of appeals raises an important issue about the reach of the Double Jeopardy Clause. The holding of the Sixth

Circuit here, like the holding by the Seventh Circuit in *United States* v. *McCreery, supra,* that an appeal is barred by the Double Jeopardy Clause, even though the order of dismissal was entered before a trial had begun, involves a broad expansion of that clause. These considerations, along with a developing conflict among the courts of appeals as to the effect of the 1971 amendments to the Criminal Appeals Act, warrant the granting of the petition for certiorari here.

1. The court of appeals erroneously construed the Criminal Appeals Act in a manner contrary to the clear language of the Act and the intent of Congress in amending Section 3731. In reaching its result, the court of appeals relied on cases construing the old Criminal Appeals Act (18 U.S.C. 3731 (1964 ed.)), which Congress expressly intended to overrule. Prior to the 1971 amendments, Section 3731 authorized an appeal to the court of appeals from "a decision or judgment setting aside, or dismissing any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this section." This provision was generally construed as authorizing appeals to the court of appeals *only* from orders dismissing indictments which rested on a defect in the indictment or institution of the prosecution. The legislative history of former Section 3731, which was said to reflect a policy consideration against permitting appeals in criminal cases by the United States, was cited as a justification for ignoring what was acknowledged to be the plain language of the old Criminal Appeals Act. See, *e.g., United States* v. *Apex Distributing Co.,* 270 F. 2d 747 (C.A. 9); *United*

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States v. *DiStefano*, 464 F. 2d 845, 847 (C.A. 2). Accordingly, it was held that an appeal did not lie to the court of appeals from pretrial orders dismissing indictments where the district court determined on the basis of stipulated or undisputed facts that there was a valid defense to the indictment, and also where the dismissal was for failure to prosecute or was predicated on the failure of the United States to comply with a discovery order. *United States* v. *Apex Distributing Co.*, *supra*, 270 F. 2d at 751; *United States* v. *DiStefano*, *supra*, 464 F. 2d at 848; *United States* v. *Ponto*, 454 F. 2d 647 (C.A. 7 *en banc*); *United States* v. *Findley*, 439 F. 2d 970 (C.A. 1); *contra*, *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8).

Since many of these orders could not be appealed directly to the Supreme Court under the provisions of former Section 3731 (cf. *United States* v. *Brewster*, 408 U.S. 501, 504–507), and since often where such an appeal was possible, the issue was not of sufficient importance to justify review by this Court, Congress determined to amend Section 3731 to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits." S. Rep. No. 91–1296, "Amendments to the Criminal Appeals Act" (October 8, 1970) 91st Cong., 2d Sess., pp. 2–3.[2]

[2] The amendments to the Criminal Appeals Act, which were enacted as part of Omnibus Crime Control Act of 1970, 84 Stat. 1890, were drafted by the Senate Judiciary Committee. They were adopted without change by the Senate, and were modified only by a clarifying amendment added in the conference committee (H. Conf. Rep. No. 91–1768, 91st Cong., 2d Sess., p. 21). The "well considered and carefully prepared" Senate Judi-

Congress took particular notice of the manner in which the old Criminal Appeals Act had been construed (Sen. Rep. *supra*, p. 5):

> Although the literal language of the present statute appears to authorize an appeal to a court of appeals whenever an indictment or information is dismissed, "* * * except where a direct appeal to the Supreme Court * * * is provided * * *," the statute has not been so interpreted. * * *
>
> * * * [T]he Criminal Appeals Act, as interpreted today, does not provide for an appeal by the United States to any court in a large variety of cases where the dismissal is based on grounds having nothing to do with any defect in the indictment, or the construction or invalidity of the underlying statute. For example, if a court issues an order for discovery, believed to be unauthorized, a court will dismiss the indictment if the prosecutor refuses to comply. There is at present no way the prosecution can test the validity of that dismissal and the underlying order. If a court dismisses an indictment for lack of timely prosecution under the Federal Rules, without finding a denial of the constitutional right to a speedy trial, the Government has no right to appeal. * * * Also, the statute, passed at a time when the range of Federal prosecutions was considerably narrower, fails to take into account the current necessity of reviewing administrative records in connection with a crimi-

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ciary Committee Report is, therefore, particularly relevant in construing Section 3731, *Schwegmann Brothers* v. *Calvert Distillers*, 341 U.S. 384, 395–396 (Jackson, J., concurring).

> nal prosecution—an outgrowth of the tremendous expansion of administrative agencies, particularly the establishment of the Selective Service System, since 1907. This has given rise to situations which do not readily fit into categories of pleadings recognized at the time the act was first passed.

Congress therefore amended Section 3731 to "afford the Government the right of appeal from the dismissal of a criminal prosecution in all cases where the decision rendered by the district judge does not result in an acquittal after jeopardy. As a result, review of a lower court dismissal will be precluded only where the double jeopardy clause of the Constitution mandates it" (Sen. Rep., *supra*, p. 18).

Moreover, Congress indicated specifically its desire to provide for appeal in cases such as this (Sen. Rep., *supra*, p. 14):

> The problems of appealability have recently become especially serious in selective service cases where judges have reviewed defendants' selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards. *These are issues to be determined by a judge, not a jury, and there is no reason why they should not be subject to appellate review.* The question of whether actions such as those resulting in selective service case dismissals are appealable to courts of appeals, if appealable at all, is currently being litigated. If it should be decided that such appeals lie only to the Supreme Court, this will make it difficult for the Government to take appeals in a large number of selective service cases which ought to be re-

> viewed, because such decisions often turn on special, narrow facts and thus are not sufficiently important to warrant an appeal to the Supreme Court. [Emphasis added.]

The Criminal Appeals Act, as amended, plainly carries out the expressed intention of Congress. Section 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Act contains no exception for appeals from dismissals which "rests, not upon the sufficiency of the indictment alone, but upon extraneous facts" (App. A, *infra*, p. 21). In order to avoid just such a narrow reading of the new Act, similar to the interpretation that had been imposed upon the old Act by judicial gloss, Congress specifically directed in the new statute that "[t]he provisions of this section shall be liberally construed to effectuate its purpose."[3]

In sum, we respectfully submit that, unless an appeal is barred by the Double Jeopardy Clause, the interpretation placed on Section 3731 by the court

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[3] The "explicit expression of this intent" was added "in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted" (Sen. Rep., *supra*, p. 18).

below is so plainly wrong that summary reversal would be warranted.

2. The court of appeals here, in accordance with the holding of the Seventh Circuit in *United States* v. *McCreery, supra,* viewed the district court's order as a "judgment of acquittal," and concluded that an appeal in a context like this one is barred by the Double Jeopardy Clause. That approach, we submit, is erroneous. The law is clear that jeopardy attaches so as to bar further prosecution only "when a jury has been selected and sworn." *Illinois* v. *Somerville,* No. 71–692, decided February 27, 1973, slip. op., p. 8; *United States* v. *Jorn,* 400 U.S. 470, 479–480; *Downum* v. *United States,* 372 U.S. 734; *Green* v. *United States,* 355 U.S. 184. Since the motion to dismiss in this case was made prior to the commencement of trial and before a jury had been selected, jeopardy had not attached and further prosecution was not barred by the Double Jeopardy Clause.

The effect of these decisions cannot be avoided simply by attaching the label of an "acquittal" to the pretrial dismissal of the indictment (App. *infra.,* p. 21; *United States* v. *McCreery, supra,* slip op., p. 2). The Double Jeopardy Clause protects a defendant from being "twice put in jeopardy" for the same offense. An "acquittal" for the purpose of barring further prosecution under the Double Jeopardy Clause can only be a determination of the merits made by the trier of facts *after jeopardy has attached.* Cf. *Fong Foo* v. *United States,* 369 U.S. 141, 143. Here the district court dismissed the indictment before trial and before jeopardy attached. Under these circumstances the Double Jeop-

ardy Clause does not bar an appeal even though it was based on facts *de hors* the indictment. The mere fact that a judge in deciding a pretrial motion under Rule 12(b) reaches out to consider or pass upon facts that could also be considered during a trial on the merits does not convert the hearing and determination of a pretrial motion into a trial subjecting the defendant to jeopardy. This conclusion is especially evident where, as in the present case, neither the defendant nor the government waived the right to a trial of the merits before a jury. See Rule 23(a), Fed. R. Crim. P.; *Singer* v. *United States*, 380 U.S. 24.

Particularly apposite here are the cases decided under provisions of the Criminal Appeals Act, prior to the 1971 amendments. Section 3731, as it then read, authorized a direct appeal to this Court from a district court "decision or judgment sustaining a motion in bar, *when the defendant had not been put in jeopardy*" (18 U.S.C. 3731 (1964 ed.), emphasis added). The cases consistently held that appeals from pretrial orders dismissing indictments, which otherwise came within the technical definition of a motion in bar, were not barred by the "jeopardy" exception to Section 3731. See, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 283, holding that "[t]he defendant in this case had not been put upon trial, therefore he had not been put in jeopardy"; *United States* v. *Blue*, 384 U.S. 251, 253, holding that since the defendant "had not yet been brought to trial and put in jeopardy when dismissal occurred * * * our jurisdiction under the statute is secure * * *." Accord: *United States* v. *Murdock*, 284 U.S. 141; *United States* v. *Halseth*, 342 U.S. 277;

United States v. *Covington*, 395 U.S. 57, 59, n. 2. Cf. *United States* v. *Brewster*, 408 U.S. 501, 506.

The orders dismissing the indictments in those cases, as in the instant case, were entered before trial and did not rest "upon the sufficiency of the indictment alone, but upon extraneous facts" (App. A, *infra*, p. 21). In each of these cases it was held that the defendant had not been put in jeopardy and that the government could constitutionally appeal the pretrial dismissal of the indictment. These holdings are plainly controlling here on the constitutional issue.

The decision in *United States* v. *Sisson*, 399 U.S. 267, upon which the court of appeals relied, does not require a contrary result. There the district court entered a *post*-trial order, which it denominated as an order "in arrest of judgment," terminating the prosecution in favor of the defendant. The determination in *Sisson* that the government could not appeal from this order, because it was "in fact an acquittal," was predicated on the fact that the order of the district court was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at trial" (399 U.S. at 288). Accordingly it was held that the action could not be distinguished from a directed judgment of acquittal entered notwithstanding a jury verdict of guilty under Rule 29(b) of the Federal Rules of Criminal Procedure (399 U.S. at 290). Since Congress had not sought to provide for appeals from such orders under the old Criminal Appeals Act, the appeal by the government was dismissed.

The present case is quite distinguishable from *Sisson*. Here the criminal prosecution was aborted *prior* to trial and before jeopardy attached. More

significantly, the holding in *Sisson,* despite some *dicta* in the opinion (399 U.S. at 289–290), did not rest on the Double Jeopardy Clause.[4] That decision was based on a determination of "this Court's jurisdiction over the appeal under 18 U.S.C. 3731 [1964 ed.]." See *United States* v. *Jorn,* 400 U.S. 470, 478, n. 7. Moreover, even under the definition of an acquittal in *Sisson*—"a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *" (399 U.S. at 290, n. 16)—the district court order here was not an acquittal. The dismissal was not a legal determination on "the basis of facts adduced at the trial," nor did it relate to the "general issue in the case," *i.e.,* whether the respondent Rothfelder had knowingly and willfully failed to report for induction.

On the contrary, the motion to dismiss was made pursuant to Rule 12(b)(1) which states:

> Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

"A defense is thus 'capable of determination' if trial of the facts surrounding the commission of the alleged

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[4] The lower courts have since held that where the only relief the United States seeks on appeal is to compel the entry of a judgment of conviction in accordance with the verdict of the jury, as was the case in *Sisson*, the Double Jeopardy Clause does not bar appellate review. See, *e.g.*, *United States* v. *Weinstein*, 452 F. 2d 704, 711, n. 10 (C.A. 2), certiorari denied, *sub nom. Grunberger* v. *United States*, 406 U.S. 917; *United States* v. *Zisblatt*, 172 F. 2d 740, 743 (C.A. 2), appeal dismissed, 336 U.S. 934. See also, *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8); *United States* v. *Real*, 446 F. 2d 40 (C.A. 9). The Double Jeopardy Clause bars an appeal only where the relief sought requires "that the petitioners be tried again for the same offense" of which they were acquitted. *Fong Foo* v. *United States*, 369 U.S. 141, 143.

offense would be of no assistance in determining the validity of the defense." *United States* v. *Covington*, 395 U.S. 57, 60. Here the district court had jurisdiction to determine a "defense" based on a claim of improper classification precisely because it was "capable of determination" without consideration of "the facts surrounding the commission of the alleged offense." Cf. *United States* v. *Sisson, supra*, 399 U.S. at 301.

In sum, the dismissal of the indictment here was not an acquittal after jeopardy. The court of appeals erred in concluding otherwise.

3. There is a conflict among the courts of appeals regarding the construction and effect to be given the 1971 amendments to the Criminal Appeals Act. The Court of Appeals for the Fourth Circuit, and the court below, appear to take the position that the 1971 amendments to the Criminal Appeals Act did not mark any change from prior law. See *United States* v. *King*, No. 72-2213, decided March 21, 1973 (C.A. 4), petition for writ of certiorari being filed herewith; cf. *United States* v. *McCreery, supra*, reaching the same result on constitutional grounds. The Court of Appeals for the Second Circuit has held, however, that the 1971 amendments made substantial changes in the Criminal Appeals Act (*United States* v. *DiStefano*, 464 F. 2d 845,

[8] There the Second Circuit held that, while the old Criminal Appeals Act did not permit an appeal to the court of appeals from a pre-trial order dismissing an indictment for failure to prosecute—since the basis of dismissal did not turn on a defect in the indictment, "[i]t is beyond question that if appealability were governed by the statute now in effect, 18 U.S.C. § 3731, as amended by § 14(a) of the Omnibus Crime Control Act, 84

847 (C.A. 2).[5] And the Court of Appeals for the Ninth Circuit has accepted jurisdiction, though without discussion, of an appeal from a pretrial dismissal of an indictment based on the district court's determination (on facts *de hors* the indictment) that the defendant could not, as a matter of law, have committed the offense alleged. *United States* v. *Hoctor,* No. 71–2773, decided March 1, 1973 (C.A. 9). An authoritative construction of the Criminal Appeals Act by this Court is therefore essential. "Otherwise the courts and the parties must [continue to] expend energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson,* 399 U.S. 267, 307.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1973.

Stat. 1890 (1970), the order dismissing the indictment would be appealable" (464 F. 2d at 846–847). This holding, which is consistent with the language and legislative history of the 1971 amendments, rejects the reasoning upon which the court of appeals here, and the Fourth Circuit in *King*, *supra*, relied.

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 72–1617

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDMUND HERMAN ROTHFELDER, DEFENDANT-APPELLEE

Appeal From United States District Court for the Western District of Michigan.

Decided and Filed February 28, 1973

Before PHILLIPS, Chief Judge, WEICK and MILLER, Circuit Judges.

WEICK, Circuit Judge. The Government has appealed under authority of 18 U.S.C. § 3731, as amended January 2, 1971, from the judgment of the District Court granting the defendant's pretrial motion to dismiss the indictment which charged him with willfully failing to comply with an order of his Local Board to report for induction, in violation of 50 U.S.C. App. § 462. In passing upon the motion to dismiss, the Court considered the evidence in the Selective Service file, which disclosed the following facts:

On October 15, 1969, when the Local Board had received notice that Rothfelder was a full-time student at Lansing Community College, it reclassified him I-S(C). The minutes of the Local Board indicated a termination date of October, 1970. The Michigan State

Selective Service Headquarters requested the file for review, then it wrote to the Local Board stating that normally a I–S(C) classification is made to expire at the end of the registrant's academic year, and suggesting that the case be reviewed in June, "and if the registrant is not in summer school, his classification should be reopened and considered anew." The Board followed the suggestion of the State Headquarters and classified Rothfelder in I–A. At that time Rothfelder was not enrolled in any school. The Appeals Board classified him in I–A and he was ordered to report for induction. Rothfelder was indicted when he failed to report.

The District Court, construing the applicable regulations (32 C.F.R. §§ 1622.15 and 1622.25(b)), held that "academic year" meant a full twelve-month year, and it made no difference whether registrant was enrolled in the summer. The Court held that the change of classification from I–S(C) to I–A was illegal as a matter of law. It was influenced by the provisions of 32 C.F.R. § 1622.25(b), which includes a twelve-month period following the beginning of registrant's course of study, but this regulation seems to apply to a II–S classification rather than a I–S(C) classification. The Court relied on *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274 (S.D.N.Y., 1969), and *United States* v. *Wood,* 329 F. Supp. 68 (D.N.H., 1971), and declined to follow contrary decisions in *Peller* v. *Selective Service Local Board No. 65,* 313 F. Supp. 100 (N.D. Ind., 1970), and *McLain* v. *Selective Service Local Board No. 47,* 439 F.2d 737 (8th Cir. 1971). To the same effect is the unreported opinion of the Seventh Circuit in *Robinson* v. *Hershey,* No. 17,697, decided July 14, 1969.

In his brief Rothfelder challenges our jurisdiction to entertain this appeal.

The 1971 Amendment to § 3731 reads:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." (18 U.S.C. § 3731 (Supp. 1972))

In *United States* v. *Sisson,* 399 U.S. 267 (1970), it was held that an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If the indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available.

This rule was recognized in *United States* v. *Brewster,* 408 U.S. 501, 506 (1972), but the Supreme Court found that the District Court did not rely on factual matter other than facts alleged in the indictment. In the present case, the District Court clearly did rely on facts not alleged in the indictment and based its decision on facts contained in the registrant's Selective Service file. Its judgment operated as an acquittal. *United States* v. *Findley,* 439 F. 2d 970 (1st Cir. 1971); *United States* v. *Ponto,* 454 F.2d 647 (7th Cir. 1971), *affirmed en banc,* 454 F.2d 657. *Cf., United States* v. *Weller,* 466 F.2d 1279 (9th Cir. 1972); *United States* v. *Apex Distrib. Co.,* 270 F. 2d 747 (9th Cir. 1959). While these cases involve Section 3731 as it was prior to the 1971 Amendment, it is clear that under the Amendment no appeal is available from a judgment of acquittal.

The Government relies on language of the Supreme Court in *United States* v. *Jorn,* 400 U.S. 470 (1971),

to the effect that there can be no double jeopardy until the defendant is put to trial before the trier of the facts. In that case, however, the Court found double jeopardy because the trial court abused its discretion by aborting the trial and declaring a mistrial without the consent of the defendant.

The appeal is dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72–1617

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

EDMUND HERMAN ROTHFELDER, DEFENDANT-APPELLEE.

Before: PHILLIPS, *Chief Judge,* WEICK, and MILLER, *Circuit Judges*

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered that the appeal be dismissed.

No costs taxed.

Entered by order of the Court.

JAMES A. HIGGINS,
Clerk.

A True Copy.
Attest:

JAMES A. HIGGINS, *Clerk.*

APPENDIX C

United States of America, in the District Court of the United States for the Western District of Michigan, Southern Division

G–143–71 Cr.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

EDMUND HERMAN ROTHFELDER, DEFENDANT

OPINION AND ORDER

The defendant is charged with willful failure to report for induction into the Armed Forces of the United States in violation of 50 USC App. § 462(a). Defendant moves to dismiss on the grounds that his induction was illegal as a matter of law.

The facts of the case are undisputed. Between December 1968 and September 1969 defendant Rothfelder dropped out of college and thus lost his II–S deferment. In September 1969 he returned to college and so informed his local board. While at school he received an order to report for induction. Upon his notification, the local board promptly postponed his induction.

On October 2, 1969 defendant submitted to his local board Michigan form No. 7 (Selective Service Report on Student Status) reaffirming his full-time student status. On October 15, 1969 Rothfelder was reclassified I–S(C). The board minutes, SSS form 99, note a termination date of October 1970. These facts were

properly communicated to defendant by his local board.

Between October 1969 and February 1970 the State Selective Service Headquarters reviewed defendant's file, and on February 18, 1970 sent the following message to the local board:

> "It is noted that the Local Board has placed the registrant in Class I–S(C) until October, 1970. Normally a I–S(C) classification is made to expire at the end of the registrant's academic year.
>
> "Therefore, it is believed that this registrant's case should be reviewed in June and if the registrant is not in summer school, his classification should be reopened and considered anew."

Following the suggestion of the State Selective Service Headquarters, the local board reclassified defendant I–A on June 17, 1970. Upon receiving notice of his reclassification, defendant promptly wrote the local board expressing his reliance on the October date.[1] Defendant properly appealed his classification and was ordered to report for induction on October 30, 1970.

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[1] Defendant's letter reads as follows:

"Last month I received a notice of classification changing my status from 1S(c) to 1A. My former classification received in October 1969 was supposed to run to October 1970 according to the old notice. I am still in school at Michigan State University as I was Spring term. I am taking no classes this summer as I am trying to save some money for the coming year and as we have moved to a student apartment on campus (address below). This fall I will again carry a full load as well as continuing my job at Oldsmobile.

"If there has been some misunderstanding between me and Michigan State University leading to or creating a lack of information please let me know. You sent no explanation for this reclassification so this must be the problem as far as I

The single question of law presented on these facts is whether Rothfelder's I–S(C) classification was illegally terminated. The regulations relevant to deciding this issue are as follows:

> 32 C.F.R. § 1622.15
>
> "In Class I–S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I–S under the provisions of this paragraph (1) who has previously been placed in Class I–S thereunder or: (2) who has been deferred as a student in Class II–S and has received his baccalaureate degree;
>
> A registrant who is placed in Class I–S under the provision of this paragraph shall be retained in Class I–S; (1) *until the end of his academic year* or; (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.
>
> The date of the classification in Class I–S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form 102) and be identified on that record as Class I–S(C)." (Emphasis added)

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can see. Could you check this matter and see if this can be straightened out. I would feel better having things settled this week if possible as I may get a chance to leave town for a two-week period or more because of change-over beginning next week.

Sincerely yours,

(signed) EDMUND H. ROTHFELDER
SS. No. 20-262-45-1404
1625 D Spartan Village, M.S.U.
East Lansing, MI 48823"

32 C.F.R. § 1622.25(b)

> "In determining eligibility for deferment in Class II–S, a student's "academic year" shall include the 12-month period following the beginning of his course of study."

Because defendant was a full-time college student at the time of his order to induction in 1969 he was clearly entitled to the I–S(C) classification under 32 C.F.R. § 1622.15(b). The regulations required that defendant be retained in Class I–S(C), "until the end of his academic year." The issue presented by this case boils down to the narrow question, what is meant by "academic year" under 32 C.F.R. § 1622.15(b)?

32 C.F.R. § 1622.25(b), quoted above, defines "academic year" for class II–S purposes as the 12-month period following the beginning of the student's course of study. There is no dispute that for purposes of the II–S classification this means that an "academic year" for a student beginning classes in September lasts 12 months until the following September. Defendant argues that the same definition of "academic year" was intended and should likewise apply to the I–S(C) classification.

At least four cases have been decided on this precise issue. Two cases, Peller v. Selective Service Local Board No. 65, 313 F.Supp. 100 (N.D. Ind. 1970), and McLain v. Selective Service Local Board No. 47, 439 F.2d 737 (6th Cir. 1971), hold that "academic year" does not mean 12 months from the beginning of classes. Two other cases, Walsh v. Local Board No. 10, 305 F.Supp. 1274 (S.D.N.Y. 1969), and U.S. v. Wood, 329 F.Supp. 68 (D. N.Hamp. 1971), come to the diametrically opposite result and hold that "academic year" as defined in 32 C.F.R. § 1622.25(b) applies to I–S(C) classifications, i.e., "academic year" means 12 months from the beginning of classes.

This court is persuaded by the reasoning of the later two cases. As stated in the Walsh case, "neither the statute nor the regulations contain the slightest suggestion that 'academic year' is to be defined differently for a I–S(C) classification than for a II–S classification." 305 F.Supp. at 1279. Judge Bownes, while examining the language just quoted, reasoned:

> "The phrase 'academic year' usually means from September to June, a nine month period. Despite the number of months actually involved, it means the period of time necessary to complete one year's study. *The summer vacation period is a hiatus in the academic year, not the end of it.* To say that a year usually connotes twelve months is to labor the obvious." (Emphasis supplied.) 329 F.Supp. at 71.

Modern colleges and universities no longer operate on academic years of two semesters or three terms, but rather function year round on three semesters or four terms. Many students need the summer term to complete one year's study. Thus, 32 C.F.R. § 1622.25(b) gives recognition to the reality of the twelve-month "academic year."

On the facts before the court in this case, the local board originally interpreted "academic year" as twelve months and informed the defendant that his I–S(C) classification would be good until October of 1970. At the direction of the State Headquarters the local board unexpectedly terminated defendant's I–S(C) classification without explanation. Having properly notified his local board of his student status, defendant had the right to rely on its official representation to him that the I–S(C) classification would terminate in October of 1970.

The fact that this particular defendant did not require the summer term to complete his year's work does not alter the fact of the University's twelve-month

academic year. In view of the fact that the regulations offer no alternative definition for I–S(C) purposes, that the local board originally interpreted the regulation as requiring twelve months in class I–S(C), and in view of the twelve-month academic year actually conducted by today's colleges and universities, this court holds that "academic year" as used in 32 C.F.R. §1622.15(b) means twelve months from the start of classes.

Because the local board terminated defendant's I-S(C) classification before the expiration of twelve months, his reclassification I–A and his later induction were unlawful. For this reason defendant's motion to dismiss is hereby granted.

IT IS SO ORDERED.

Dated: February 25, 1972.

_____ _____,

Chief District Judge.

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